No. 96-1925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CATERPILLAR, INC.,

Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its affiliated LOCAL UNION 786,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENTS BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Respondents International Union, United Automobile Aerospace and Agricultural Implement Workers of America (UAW) and its affiliated Local Union 786 (collectively "the Union") submit this brief in opposition to the petition for a writ of certiorari filed by Caterpillar, Inc. ("the Company"). The list of parties, opinions below, the basis for this Court's jurisdiction and the statutory provisions involved are correctly set out in the petition.

STATEMENT OF FACTS

For many years, the UAW has served as the collective bargaining representative of Caterpillar's hourly employees at plants throughout the country. The labor agreement

between Caterpillar and the UAW—like virtually every labor agreement to which the UAW is a party—includes a procedure for the resolution of employee grievances through various "steps" culminating, if necessary, in arbitration.

The Caterpillar/UAW labor agreement also establishes a "system of Union Representation for the processing and settlement of grievances." C.A. App. 45. In the case of the York, Pennsylvania facility involved in this case, the Agreement provides for more than 100 union stewards "elected from among the employees under the supervision of each Foreman," C.A. App. 77, and for a grievance committee consisting of nine committee members to be elected from zones which are defined in the agreement and a grievance committee chair to be "elected from among employees in the bargaining unit," C.A. App. 46.

Since 1942, the labor agreements between Caterpillar and the UAW—like collective bargaining agreements throughout the industrial sector—have permitted employees elected to these various grievance processing positions to perform their representational functions during work hours without loss of pay.[1] These "no-docking" provisions were first included in the Caterpillar-UAW agreement in 1942 pursuant to a ruling by the War Labor Board which—noting that "[t]he practice of paying union representatives while they are handling grievances is very common in industry"—directed that "the [Caterpillar] contract should provide for compensation of union representatives who lose time in handling grievances." *Caterpillar Tractor Co.*, 2 War Labor Rep. 75, 95 (1942).

[1] As of 1947, when the Labor Management Relations Act was enacted, "no docking provisions in collective bargaining agreements were common, with approximately 40% of all industrial collective bargaining agreements containing such provisions." *BASF Wyandotte Corp. v. Chemical Workers Local 227*, 791 F.2d 1046, 1050 (2d Cir. 1986), *citing* Bureau of National Affairs, *Basic Patterns in Collective Bargaining Contracts* 15:27 (1948). By 1980, the number of industrial agreements containing such provisions had grown to nearly two-thirds. U.S. Department of Labor, *Major Collective Bargaining Agreements: Employer Pay and Leave for Union Business*, Bulletin 1425-19, Table 1, p. 32 (1980).

Prior to 1973, the committeemen, stewards and grievance chairmen were entitled to take time off as needed "without loss of pay for regularly scheduled hours to represent employees in the grievance procedure." C.A. App. 276-277. As the volume and complexity of grievances increased, the grievance chairmen began *de facto* to devote full time to their grievance-related work with little or no time left for their regular production work. C.A. App. 257.

Beginning in the early 1970's, the UAW and various companies in the agricultural implement industry agreed to define a limited number of union positions within each plant as *de jure* full-time positions.[2] Employees elected to such positions were, by contract, permitted to perform certain contractually-defined representational functions throughout the entire workday, during their term in elected office, without loss of pay.[3] These agreements adopted the approach that had been followed universally in the automobile manufacturing industry since the early 1940's.[4]

[2] The UAW negotiated such a provision with Deere and Company in 1971, C.A. App. 270; with Caterpillar in 1973, C.A. App. 264; and with J.I. Case Corp. in 1977, C.A. App. 408.

[3] At the York plant, for example, the position of grievance chairman was defined as a full-time position. Caterpillar continued to pay the employee who was elected to that position his regular wages and benefits for time devoted to grievance processing, but not for time devoted to other tasks such as collective baragining or internal union matters. C.A. App. 50. Caterpillar maintained the employee elected as chairman on its employment roles as an active employee and continued to treat him as an employee for various statutory purposes such as payment of FICA taxes. C.A. App. 705-07.

[4] In 1941, the national agreement between the UAW and Ford Motor Co. provided that the chairmen of the bargaining committees

This system of as-needed and full-time paid leave functioned quite smoothly from 1973 through succeeding collective bargaining agreements and allowed Caterpillar employees to run for and perform the duties of grievance chair without loss of pay.[5] But on October 30, 1992—in the wake of a national strike and deteriorating labor relations between the UAW and Caterpillar—Caterpillar's Director of Labor Relations, in an avowed effort to "put economic pressure on the union," repudiated "until a new agreement is reached" its obligation to pay the chairman his regular wages for the time spent during the work day performing his representational duties. C.A. App. 144.

The Union filed unfair labor practice charges with the National Labor Relations Board contesting Caterpillar's action. The next day Caterpillar commenced this unusual declaratory judgment proceeding in which it sought a ruling that for the preceding twenty years the Company had been engaged in criminal behavior, by paying the regular wages of the employee elected to serve as grievance chair for the time that individual spent during the regular work day performing the grievance-processing duties spelled out in the contract.

The district court, bound by the decision of a divided panel of the Third Circuit in *Trailways Lines v. Trailways Inc. Joint Council*, 785 F.2d 101 (3rd Cir. 1986), *cert. denied*, 479 U.S. 932 (1986), ruled for Caterpillar. After

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at each facility "shall devote their full time to their duties as such." C.A. App. 295. The 1941 agreement between the UAW and General Motors and the 1943 agreement between the UAW and Chrysler similarly provided for full time leave for the chairmen at each facility. C.A. App. 335, 376.

[5] For example, the grievance chair at Caterpillar's York facility when the events that give rise to this action transpired had worked as a regular Caterpillar hourly employee for more than twenty-one years before being elected to serve as chair, and was in the second year of a three year term of office. Unless reelected, he returns to regular hourly production work when his term expires.

oral argument before a panel of the Third Circuit, the court of appeals, *sua sponte*, set the case for consideration *en banc*. By a vote of 8-3, the Third Circuit decided to overrule *Trailways*, to reverse the district court and to uphold the legality of the "no-docking" provision.

ARGUMENT

The question posed here is whether § 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186 ("LMRA"), prohibits an employer and a union from agreeing, in arms length collective bargaining, to permit employees elected to a union office to devote some or all of their working hours to discharging the duties of that office without loss of pay or benefits. Such "no-docking" provisions have been an integral part of the system of labor relations in this country since the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, was enacted over sixty years ago. And with the decision below, four circuits have now held that such provisions are, indeed, lawful under § 302. No court of appeals has reached a contrary conclusion.[6]

Thus, while the lower court law may be vexatious to petitioner Caterpillar, given its current desire "to try to gain leverage in [a] protracted labor dispute," Pet. at 2, it simply is not true that the question posed here "has vexed the lower courts" or "produced inter-circuit disagreement if not disarray." Pet. at 8. Nor is there any basis in reality to Caterpillar's suggestion that the decision below marks "a fundamental change in the federal policy favoring labor-management independence." Pet. at 9. Thus, all of Caterpillar's reasons for a grant of its certiorari petition are entirely without substance.

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[6] The decisions of the district courts, and of the National Labor Relations Board, are to the same effect. *See IBEW v. National Fuel Gas*, 16 Employee Benefits Cases (BNA) 2018 (W.D.N.Y. 1993); *CWA v. Bell Atlantic*, 670 F. Supp. 416 (D.D.C. 1987); *International UAW v. CTS Corp.*, 783 F. Supp. 390 (N.D. Ind. 1992); *National Fuel*, 308 NLRB 841 (1992).

1. LMRA § 302(a) broadly prohibits any payments by an employer to "any representative of any of his employees." Section 302(c)(1), however, recognizes that an individual may, at one and the same time, be *both* a union representative and an "employee or former employee" of the employer, and § 302(c)(1) saves from illegality payments to such individuals made "as compensation for or by reason of the [individual's] service as an employee." 29 U.S.C. § 186(c)(1). It is the meaning of that section which has been at issue in the no-docking cases.

(a) The first court to "conclude that [a] no-docking provision . . . was not unlawful" was the Second Circuit in *BASF Wyandotte v. Local 227*, 791 F.2d 1046, 1054 (2nd Cir. 1986). Writing for the Court in that case, Judge Kearse interpreted 302(c)(1) as follows:

> It appears that in using the alternative formulations "for" and "by reason of" Congress intended to cover two general categories of employee compensation: (1) wages, i.e. sums paid to an employee specifically for the work he performs, and (2) compensation occasioned by the fact that the employee has performed or will perform work for the employer, but which is not payment directly for that work. The latter category would include such employee "fringe" benefits as vacation pay, sick pay, paid leave of jury duty or military service, pension benefits, and the like. [*Id.* at 1049]

And, Judge Kearse went on to conclude that a payment of wages pursuant to a no-docking clause for time spent tending to union duties, "is not, in our view, different in kind from the employer's granting of such benefits as sick leave, military leave, or jury leave." *Id.*

In *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849 (5th Cir. 1986), a case involving the same employer and "facts almost identical" to those before the Second Circuit, *id.* at 855, the Fifth Circuit likewise "reject[ed] the company's position that the privileges at issue are

illegal under § 302," *id.* at 856. The Fifth Circuit's decision echoes the Second Circuit's analysis of both the statutory language and the legislative history, as even Caterpillar concedes. Pet. at 12.

Just last year, in *Herrera v. UAW*, 73 F.3d 1056 (10th Cir. 1996), the Tenth Circuit was content to decide the no-docking issue by "adopt[ing] the analysis . . . of the district court," *id.* at 1057, which had held that "the law is clear that payments to union officials for time spent on union business does not violate [section 302]." *Herrera v. UAW*, 858 F. Supp. 1529, 1546 (D. Kan. 1994).

Thus, in upholding the agreement at issue here, and in overruling its earlier *Trailways* decision, the Third Circuit brought its law in line with the law of the other courts of appeals.

(b) Lacking even a single decision invalidating a no-docking provision, Caterpillar attempts to build its case of appellate-court discord out of two decisions arising outside of the no-docking clause context. *See* Pet. at 12-14, *discussing Toth v. USX*, 883 F.2d 1297 (7th Cir. 1989), *cert. denied*, 493 U.S. 994 (1989); *United States v. Phillips*, 10 F.3d 1565 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 1312 (1995). But the courts in those cases—while finding § 302 violations on facts which, as Caterpillar acknowledges "approached outright bribery," Pet. at 25—made plain their *agreement* with the holding of *BASF* and its progeny with respect to the lawfulness of no-docking provisions. Indeed, the court below relied on *Toth* and *Phillips* to support its conclusion that the no-docking provision at issue here is protected by § 302(c)(1). Pet. App. at 11a. Thus, on the question presented in this case, *Toth* and *Phillips* are in line with the decisions of the Second, Fifth and Tenth Circuits as well as with the instant decision of the Third Circuit.

Toth and Phillips both arose from schemes in which full-time union officials, in the course of negotiating a contract on behalf of the union with their former em-

ployer, exacted from that employer a side deal, not incorporated in the collective bargaining agreement or otherwise revealed to the union or the covered employees, whereby the negotiators would receive up to thirty years of retroactive pension credits in the employer's pension plan. In *Toth*, the Seventh Circuit upheld the dismissal of an action brought by other former employees of the same employer seeking the same retroactive pension credits that had been granted to the union negotiators; in *Phillips* the Eleventh Circuit upheld the criminal conviction of two of those negotiators.

In reaching these conclusions, the *Toth* and *Phillips* courts made clear that the mere fact that union officials were earning pension credits from their former employer while serving in union office did not establish a legal wrong.

To the contrary, *Toth* states that "[o]ne obvious instance in which continuing payments constitute recompense of past service"—and hence are permitted by § 302 (c)(1)—"is when those continuing payments were bargained for and formed part of a collective bargaining agreement." 883 F.2d at 1304. Citing *BASF*, the *Toth* Court explained that "all of the terms of employment for which unions bargain are properly deemed part of the compensation for which employees work." *Id.* But, said the *Toth* Court, in the case before it—and in contrast to the wage payments at issue in *BASF*—the pension credits were granted secretly and "not a[s] part of the bargained-for-collective bargaining agreement." *Id.* at 1305. For that reason, the *Toth* Court held that those pension credits "cannot qualify as 'compensation for or by reason of' former employment." *Id.*

Similarly, the Eleventh Circuit in *Phillips* indicated that payments to a former employee who had assumed a full-time union position would be lawful if "the employee had earned the full right to receive the benefits before going on a leave of absence to work for the union." 10 F.3d at 1575. In support of that statement the Eleventh Circuit

cited both the Second Circuit's and the Fifth Circuit's *BASF* decisions. The Eleventh Circuit went on to "agree with the Seventh Circuit [in *Toth*] that the payments akin to those in this case do not fall within the [§ 302(c)(1)] exception" because the employer had "ignored[d] the company's collective bargaining agreement . . . and secretly grant[ed] retroactive . . . pension benefits to a small number of the union's officials." *Id.* at 1576.[7]

Thus, far from casting doubt on the decisions upholding no-docking agreements, *Toth* and *Phillips* expressly reaffirm those holdings. And, as noted, the court below, in sustaining the agreement at issue here, expressly relied on both *Phillips* and *Toth* as well as on the Second, Fifth and Tenth Circuit decisions. Pet. App. at 11a, 9a.

(c) The discord that Caterpillar purports to discern in the appellate court law is thus one that has eluded the notice of the courts themselves. There is not even a hint in any of the decisions that any court has seen any inconsistency, let alone any conflict, in the circuits; to the contrary, every court has seen and treated the prior cases—with the exception of the now-overruled *Trailways* decision—as in line with each other.

Not surprisingly then, what Caterpillar claims to be a conflict is noting more than the variations in style and explanatory emphasis that invariably occur as different judges set about explaining the basis for reaching the same ultimate legal conclusion. What is determinative here is that every court has, indeed, reached the very same conclusion as to the lawfulness of no-docking provisions. On the theory of each and every one of the decisions which Caterpillar cites, Caterpillar's attack on its own collective bargaining agreement fails. There is thus nothing

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[7] Given its statement of "agree[ment]" with *Toth*, the *Phillips* Court undoubtedly would be surprised to learn, *see* Pet. at 14, that it "did not embrace" *Toth* but instead "rendered a persuasive opinion based on *Trailways*"—the one § 302(c)(1) case that the *Phillips* Court did *not* cite.

about the state of the law in this area to make this case worthy of this Court's attention.

2. At various points Caterpillar suggests that this case is not in the *BASF* line because here the employee elected as grievance chairman can, during the term of the office, devote full time to his union duties without loss of pay whereas in, e.g., *BASF*, the employees holding union office were permitted to spend only part of their time on union duties. On that basis, Caterpillar attempts to assimilate this case to *Reinforcing Iron Workers v. Bechtel Power*, 634 F.2d 258 (6th Cir. 1981), and *United States v. Kaye*, 556 F.2d 855 (7th Cir.) *cert. denied* 434 U.S. 921 (1977), which involved payments to "industry steward funds" which hired professional union representatives to perform various union tasks.

But in *Bechtel* and *Kaye* the payments were made to individuals who had *no* previous employment ties to the employer whatsoever. By definition, such payments to strangers to the employment relationship could not claim protection under § 302(c)(1) as "compensation for, or by reason of, service as an employee." *Bechtel* and *Kaye* thus stand for the unsurprising, and uncontroversial proposition—which the *BASF* cases reaffirm as well—that § 302(c)(1) does not "allow an employer simply to put a union official on its payroll while assigning him no work." *BASF v. Chemical Workers Local 227*, 791 F.2d at 1050; *see NLRB v. BASF*, 798 F.2d at 856 n.4. Here, as in those cases, there is "no merit in [the Company's] reliance on cases such as . . . *Bechtel*." 791 F.2d at 1054.

3. The court of appeals law, in other words, leaves Caterpillar no option but to argue that this case is in a class of one—unlike *Bechtel* and *Kaye* because the payments here were made to *bona fide* employees of the employer, but unlike *BASF* and its progeny because those employees are on full-time leave.

If correct, Caterpillar's contention would be self-defeating for it would reduce the importance of this case, and any conceivable claim on this Court's scarce time and resources, to the vanishing point. But in fact, Caterpillar's attempt to draw a distinction in principle between this case and *BASF* is unsound.

Contrary to Caterpillar's contention, it is simply not true that § 302(c)(1) draws a distinction between part-time and full-time union offices and requires that "union recipients of employer payments [must] be *current bona fide employees* of the employer." Pet. at 17 (emphasis in the original). To the contrary, that section in terms permits payments to either a current employee or a "*former* employee" who is a current union official so long as the payment is "by reason of" the individual's prior or contemporaneous service as an employee. And given that, as the court below stated, "the nature of the absences and the payments made by the employer owing them is the same" regardless of the number of hours an employee spends performing union work, "it would be strange indeed if Congress intended that granting four employees two hours per day of paid union leave is permissible while granting a single employee eight hours per day of that same leave is a federal crime." Pet. at 12a, 10a.

4. Caterpillar's claim that the decision below introduces a "fundamental change in federal labor policy" fares no better. Pet. 19-24. All that the court here did was to *uphold* a collective bargaining agreement provision to which Caterpillar has been a party since 1973 and which other companies have adopted since at least the early 1940's. It is difficult to understand how that can amount to a change in labor policy at all.

What Caterpillar does, in the guise of arguing that the decision below "fundamental[ly] change[s]" labor policy, is to launch into a lengthy policy disagreement with the court of appeals' decision. This is not the time or place to brief the merits of the decision below. Three points are worth brief mention, however.

First, Caterpillar's policy discussion makes no attempt to deal with the language of the statute or to proffer an

interpretation of the statutory text which would condemn the payments at issue here while at the same time permitting the wage payments Caterpillar continues to make to part-time union officials who spend part of their working day on leave to perform union business.

Second, Caterpillar likewise fails to do business with the legislative history of § 302 which was reviewed at length by the Second Circuit in *BASF* and which shows that the Congress that enacted that section was "well aware of the widespread use of no-docking provisions," 791 F.2d at 1051, and "manifested [an] intent . . . to increase the availability of expanded no-docking provisions," *id.* at 1053. Instead, Caterpillar relies on snippets of legislative history taken from the *opponents* of § 302 decrying the proposed section's breadth. *See* Pet. at 21. Such statements are notoriously *unreliable* guides to statutory interpretation. And, that is especially true where, as here, the *proponents* of the statute stated a far more limited intent. *See, e.g.,* 93 Cong. Rec. at 7683 (Sen. Ball). *See also Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).

Third and finally, for all its talk about "the independence of labor from management," "the policy of financial self-reliance," "prevent[ing] unions from developing addictions to employer subsidies," and the like, Pet.. at 19, Caterpillar nowhere explains why wage payments to full-time union officers are more threatening to these policies than payments to part-time union officers. Caterpillar's silence in this regard is pregnant with significance.

When all is said and done, then, the position that Caterpillar espouses in this case does not rest on any foundation in the law but on Caterpillar's admitted desire "to try to gain leverage in the protracted labor dispute" between the Company and the UAW. Pet. at 2. Nothing about this *sui generis* litigation merits review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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